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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Request for Rescission of Contract]

FILE: B-200907

DATE: March 26, 1981

MATTER OF: G.J.K. Metals Inc.

DIGEST:

Where high bidder failed to submit proof of alleged mistake in bid prior to award, contract should not be rescinded since there were no clear indications of error due to variances between high price and other prices submitted and Government estimates.

G.J.K. Metals Inc. (G.J.K.) requests rescission of a contract awarded to it on item 20 under invitation for bids No. MIN-320, issued by the Federal Property Resources Service, General Services Administration (GSA), for the sale of industrial diamonds. We believe that rescission would be improper.

G.J.K submitted the high bid of \$30,655 (\$61.31 per carat). Other unit prices for this item ranged from \$24.14 to \$6.51. Because contracting personnel did not consider the G.J.K. unit price to be significantly out of line with the Government estimates of three diamond experts (\$32, \$35, \$50) for the item and because high bid prices received on other items varied similarly from Government estimates, the G.J.K. error was not questioned.

Prior to award, G.J.K. alleged that a typographical error had been made in its bid price on item 20--the \$30,655 price should have been \$3,655. In response to a GSA request for worksheets or other proof of the error, G.J.K. advised that because all workpapers were shredded at the end of each day, no proof of the error existed. Since no documentary proof was submitted and since the bid was not significantly out of line, the contract was awarded.

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After award and subsequent to the GSA report to our Office on this matter, G.J.K submitted two worksheets alleged to have been found after award. One of the worksheets shows a unit price of \$12.51 and an extended price of \$30,655; the other shows a unit price of \$6.31 and an extended price of \$30,655. G.J.K. contends that this information shows that a mistake was made. G.J.K. further states that the GSA advised prior to making the award that the lack of evidence to prove the existence of the mistake would not preclude rescission.

The contracting officer determined that an award to G.J.K would be consistent with 41 C.F.R. § 101-45.803 (d)(5) (1980), which provides that:

"Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the sales contracting officer shall consider the bid as submitted unless there are indications of error so clear as reasonably to justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders, in which case it may be rejected. * * *"

In recommending against rescission, GSA points to the small difference between the G.J.K. price and the Government estimates and the wide range of unit bid prices received on item 20 which are expected on sales of industrial diamonds due to varying uses for the property. Industrial diamonds are considered by some buyers, particularly foreign buyers, to be "cuttable" (i.e., of gem quality), which will cause the submission by some bidders of higher prices than might be expected. That this may be the case on item 20 is allegedly indicated by the bid of \$24.14, which is out of the general range of the lower prices received. Finally, GSA notes that in 36 Comp. Gen. 441 (1956), we stated:

"* * * In undertaking to bind a bidder by acceptance of a bid after notice of a claim of error by the bidder, the Government virtually undertakes the burden of proving either that there was

no error or that the bidder's claim was not made in good faith. * * *

GSA believes that the bidder's failure to submit proof of mistake when requested discharged the Government of its burden to show that no error occurred. It also notes that G.J.K. was not told that its contract would be rescinded notwithstanding the lack of evidence, but rather that the sales regulations provided for consideration of an allegation of mistake where no evidence existed to prove the allegation.

GSA properly considered G.J.K.'s mistake claim under the above-quoted sales regulation. Under that regulation, award must be made to the bidder merely alleging mistake without evidence unless there are indications of error so clear to conclude that an award would be unfair to the bidder or to other bidders. To conclude that an award would be unfair, the contracting officer would have had to have determined that an award to G.J.K. would have been unconscionable. This the contracting officer did not conclude, and we agree with that conclusion.

In addition to the G.J.K. unit bid price of \$61.31, a range of unit prices was received which extended from \$6.51 to \$24.14. While the G.J.K. bid price was approximately 150 percent higher than the next high bid price, past experience and the results of the bidding here showed that prices for industrial diamonds varied greatly apparently due to the highly divergent valuations placed on these diamonds by bidders, largely attributable to personal preferences and different uses. Widely varying bid prices in sales situations generally are insufficient to indicate error. See Wender Presses, Inc. v. United States, 343 F.2d. 961 (Ct. Cl. 1965). In addition, G.J.K.'s price was only 90, 74, and 23 percent higher than the three respective Government estimates. We have held that differentials of this magnitude do not make a contract unconscionable. Porta-Kamp Manufacturing Company, Inc., 54 Comp. Gen. 545 (1974), 74-2 CPD 393.

B-200907

4

Accordingly, since we find the award to G.J.K to have been reasonably and validly made, we must deny the request that the contract be rescinded.

Milton J. Arolov

Acting Comptroller General
of the United States